

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 2-82:

EASTERN MONTANA COLLEGE)
CHAPTER OF THE AMERICAN)
ASSOCIATION OF UNIVERSITY)
PROFESSORS (AAUP),)

Complainant,)

- vs -)

ADMINISTRATION OF EASTERN)
MONTANA COLLEGE AND THE)
COMMISSIONER OF HIGHER)
EDUCATION,)

Defendants.)

FINAL ORDER

The Findings of Fact, Conclusions of Law and Recommended
Order were issued by Hearing Examiner Jack H. Calhoun on
September 27, 1982.

Exceptions to the Findings of Fact, Conclusions of Law and
Recommended Order were filed on October 18, 1982, and augmented
on November 9, 1982, by Maury Evans.

After reviewing the record and considering the briefs and
oral arguments, the Board orders as follows:

1. That lines 22-27 on page 7 of the hearing examiner's
decision be considered and designated a Conclusion of Law.

2. That such Conclusion of Law be adopted by the Board.

3. IT IS ORDERED that the Complainant's Exceptions to the
Findings of Fact, Conclusions of Law and Recommended Order are
hereby denied.

4. IT IS ORDERED that this Board therefore adopts the
Findings of Fact, Conclusions of Law including the Conclusion of
Law adopted in paragraph 2, supra, and Recommended Order of
Hearing Examiner Jack H. Calhoun as the Final Order of this
Board.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

DATED this 10th day of November, 1982.

BOARD OF PERSONNEL APPEALS

By *Alan L. Joscelyn*
Alan L. Joscelyn
Alternate Chairman

* * * * *

CERTIFICATE OF MAILING

The undersigned does certify that a true and correct copy
of this document was mailed to the following on the 3rd day
of ~~November~~ December, 1982:

LeRoy Schramm
Chief Legal Counsel
Montana University System
33 South Last Chance Gulch
Helena, MT 59620

Maury Evans
American Association of University Professors
Eastern Montana College
P.O. Box 533
Billings, MT 59101

Jennifer Jacobson

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS
IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 2-82:

EASTERN MONTANA COLLEGE)
CHAPTER OF THE AMERICAN)
ASSOCIATION OF UNIVERSITY)
PROFESSORS (AAUP),)

Complainant,)

vs.)

ADMINISTRATION OF EASTERN)
MONTANA COLLEGE AND THE)
COMMISSIONER OF HIGHER)
EDUCATION,)

Defendants.)

FINDINGS OF FACT,
CONCLUSION OF LAW
AND
RECOMMENDED ORDER

* * * * *

An unfair labor practice charge was filed by the Eastern Montana College Chapter of the American Association of University Professors (hereinafter the Union) on January 15, 1982, alleging that the administration of Eastern Montana College and the Commissioner of Higher Education (hereinafter the Employer) had violated Sections 39-31-201, 39-31-306(4), and 39-31-401(3) and (5), MCA. The Employer filed its answers on February 4, 1982, and denied that it had committed any violation. Under authority of 39-31-406, MCA, and in accordance with ARM 24.26.215 and 24.26.682 et seq. a hearing was held on June 16, 1982, in Billings. The Union was represented by Mr. Maury Evans, the Employer was represented by Mr. LeRoy H. Schramm.

ISSUES

At a pre-hearing conference held on June 10, 1982, and during conference prior to the hearing, the issues raised by the charge filed were narrowed to the following: (1) whether the Employer committed an unfair labor practice when it established and paid the salary of basketball coach Douglass,

1 and (2) whether the Employer committed an unfair labor
2 practice when it established and paid the salary of Professor
3 Spector.

4 FINDINGS OF FACT

5 Based on the evidence on the record, including the
6 sworn testimony of witnesses, I make the following findings
7 of fact.

8 Salary of Coach Douglass

9 1. The American Association of University Professors
10 is recognized by the Employer as the exclusive collective
11 bargaining representative for the faculty at Eastern Montana
12 College.

13 2. On March 16, 1979, the Employer delivered a letter
14 to the Union stating that "No coach can be paid a fiscal
15 year salary whose academic year salary equivalent is above
16 the top step of the Assistant Professor, without doctorate,
17 without consent of the AAUP."

18 3. After the letter was received, the parties agreed
19 to remove coaches from the bargaining unit represented by
20 AAUP.

21 4. Contracts entered into by the parties since March
22 1979 have excluded coaches from the bargaining unit but they
23 do not limit the salaries of coaches.

24 5. Contracts subsequent to March 1979 contain a
25 provision which reads, in pertinent part, as follows:

26 This Agreement constitutes the entire negotiated Agree-
27 ment between the Commissioner, the Administration, and
28 the AAUP and supercedes all previous regulations,
29 contracts, practices, traditions, or policies which are
in conflict with the expressed terms of this Agreement...

30 6. During negotiations for contracts after March
31 1979, the Union sought to have coaches put back in the
32 bargaining unit, but the Employer did not agree.

1 7. The collective bargaining agreement does not
2 provide a formula for converting academic year salaries to
3 fiscal year salaries though it does provide that summer
4 session salaries be paid at 22 percent of the academic year
5 salary.

6 8. Basketball coach Douglass was paid \$26,000 for a
7 12-month work year in 1981-82 and \$28,600 for 1982-83. This
8 salary was approved by the Board of Regents on June 26,
9 1981, and April 16, 1982.

10 9. Assistant professors without a doctorate were paid
11 \$20,697 for 1981-82 and \$22,539 for 1982-83.

12 10. A 12 month work year contains 2080 hours (52
13 weeks x 5 days = 260 days x 8 = 2080 hours) and 235 work
14 days (260 minus 15 days vacation, minus 10 holidays).

15 11. The academic work year for 1981-82 began September 21,
16 1981, and ended June 5, 1982, resulting in a total of 165
17 work days, 9 work months and 1560 work hours (173.33 average
18 per month x 9).

19 12. Coach Douglass was paid during 1981-82, \$2,167 per
20 month, \$111 per day and \$12.50 per hour. During 1982-83,
21 the comparable figures are: \$2,383 per month, \$122 per day
22 and \$13.75 per hour.

23 13. During 1981-82, assistant professors without a
24 doctorate were paid \$2,300 per month, \$125 per day and
25 \$13.27 per hour. The 1982-83 figures are: \$2,504 per
26 month, \$137 per day and \$14.45 per hour.

27 14. An academic year plus the summer session of
28 approximately nine weeks is not comprised of as much work
29 time as a 12-month work year.

30 15. Coach Douglass' pay during the periods in question
31 here did not exceed that of an assistant professor without a
32 doctorate when converted to an academic year equivalent.

Spector's Salary

16. In the spring of 1981, the Union and the Employer were engaged in negotiations for a 1981-82 collective bargaining agreement. The Employer was also engaged in the recruitment of a mathematics professor, Mitchell Spector, to teach the 1981-82 academic year.

17. Professor Spector was hired at an academic year salary of \$17,836 for 1981-82, which included \$1,911 as a market adjustment factor (MAF) i.e., an amount in addition to base salary to compensate those persons in disciplines where recruitment and retention were difficult.

18. The collective bargaining agreement which was in effect at the time Spector was hired contained a provision which allowed the MAF to be paid during the 1979-80 and 1980-81 academic years; it did not, however, provide for an MAF for the 1981-82 year.

19. By a letter dated April 10, 1981, from the President of Eastern Montana College, the Employer offered Professor Spector a position effective September 21, 1981, at a salary of \$17,836 "subject to collective bargaining." The Board of Regents approved the appointment on May 22, 1981, and noted that it was "subject to collective bargaining."

20. On May 12, 1981, the president of the Union notified the president of the College that he believed offers of appointment were being made which included salaries to which the MAF had been added. The Union president expressed concern over the matter and pointed out that the contract only provided for the MAF during the 1979-81 period. The letter went on to ask what the president's intentions were for setting salaries pending the completion of contract negotiations.

21. On May 28, 1981, the president of the college

1 wrote a memorandum to the president of the Union requesting
2 that the Union agree to continue the MAF during negotiations.

3 22. On June 5, 1981, the president of the college met
4 with all persons who were receiving the MAF and explained
5 that the attorney for the Board of Regents had advised him
6 that the Union's interpretation of the contract was correct
7 and that no MAF should be paid after June 30, 1981.

8 23. The Union's response to the president's request to
9 continue the MAF was "no."

10 24. The Administrative Vice President of the college
11 wrote a letter to Professor Spector on October 2, 1981, to
12 inform him that his salary would not include the MAF because
13 to do so would subject the Employer to an unfair labor
14 practice charge.

15 25. Professor Spector responded to the October 2nd
16 letter by writing to the Acting President of the college on
17 October 6, 1981, to state his position on the salary question.
18 He insisted that his salary be paid at the \$17,836 per annum
19 rate and threatened to immediately resign and sue the college
20 if it did not honor its agreement.

21 26. On October 13, 1981, the Acting President of the
22 college informed Spector that he would be paid the amount
23 approved by the Board of Regents on May 22nd which included
24 \$1,911 as the MAF. He further informed him that, if the MAF
25 was ultimately negotiated, any money paid as an MAF would be
26 deducted from any amount due under a new contract. Spector
27 then withdrew his threat to resign.

28 27. The Union and certain individuals filed grievances
29 questioning the propriety of the Employer's conduct in
30 setting Spector's salary. None of the grievances has been
31 withdrawn.

32 28. The Union and the Employer reached agreement on a

1 new contract during late spring of 1982. The agreement
2 covered the 1981-82 academic year during which Professor
3 Spector was paid the MAF. The new contract also contains an
4 MAF which applies to Spector's position.

5 29. The amount due Spector under the new agreement for
6 1981-82 was more than the salary approved by the Board of
7 Regents on May 22, 1981.

8 30. Since Professor Spector had received most of his
9 MAF, his retroactive payment was less than what it otherwise
10 would have been. Others received their MAF after the new
11 contract was executed.

12 All proposed findings of fact which are inconsistent
13 with the above findings are rejected on the grounds that
14 they are not supported by the evidence on the record as a
15 whole.

16 DISCUSSION

17 The Employer raised the question of whether these
18 charges were filed within the six-month limit set forth in
19 39-31-404, MCA. The charges were filed on January 15, 1982.
20 Professor Spector's salary was finally approved by the
21 Acting President on October 13, 1981. The action of the
22 Board of Regents in approving the MAF supplement in May was
23 later determined to be contrary to the Employer's best
24 interest by the Board's attorney and, still later, by the
25 Administrative Vice President in October. The Spector
26 charge was clearly brought within the six-month period.

27 The Board of Regents set Coach Douglass' 1981-82 salary
28 on June 26, 1981. There is no evidence on the record to
29 conclusively show when the Union knew or should have known
30 about that action. But, even if the Union knew immediately,
31 the alleged unfair labor practice would not have occurred
32 until the salary was begun to be paid and when the Union had

1 knowledge or should have had knowledge of that fact. There
2 is no evidence on the record to support a conclusion that
3 that occurred earlier than six months prior to January 15,
4 1982.

5 Regarding the question of whether the Employer committed
6 a violation of 39-31-401, MCA, when it set and paid Douglass'
7 salary, not only do I find that there is no evidence to show
8 such a violation, it appears the Employer is paying him less
9 (when his salary is converted to an academic year equivalent)
10 than it pays an assistant professor without a doctorate.
11 The method used by the college to convert from a fiscal year
12 to an academic year seems logical and, in the absence of
13 anything to the contrary in the contract, a matter over
14 which it had total control.

15 Since the Employer delivered the letter of March 16,
16 1979, to the Union, the parties have negotiated two contracts
17 which specifically exclude coaches from the bargaining unit.
18 During their negotiations, the Union's proposal to bring
19 coaches back into the unit was rejected. Both agreements
20 entered into since March of 1979 contain entire agreement or
21 zipper clauses.

22 On the Douglass salary issue there simply is no evidence
23 to support a charge that the Employer committed a violation
24 of any subsection under 39-31-401, MCA, when it set Douglass'
25 salary. The Union alleged that such action violated
26 39-31-401(5), MCA, but failed to prove that there was a
27 refusal to bargain in good faith on the part of the Employer.
28 In fact, the evidence shows the parties have engaged in
29 bargaining which culminated in the exclusion of the coaches
30 from the bargaining unit.

31 With respect to the second issue raised by the Union,
32 the general rule followed by the National Labor Relations

1 Board is that unilateral changes by an employer in mandatory
2 subjects of bargaining during the course of a collective
3 bargaining relationship amount to a refusal to bargain in
4 violation of Section 8(a)(5) of the National Labor Relations
5 Act. NLRB v. Crompton-Highland Mills, 337 US 217, 24 LRRM
6 2088 (1949). The U.S. Supreme Court held in 1962 that an
7 employer's unilateral change in a condition of employment
8 which is under negotiation may be held to violate Section
9 8(a)(5) even in the absence of a finding that the employer
10 was guilty of over-all bad faith bargaining because such
11 conduct amounts to a refusal to negotiate about the matter
12 and must of necessity obstruct bargaining. The Court went
13 on to hold that such unilateral actions would rarely be
14 justified by any reason of substance, however, it did not
15 rule out the possibility that there might be circumstances
16 under which such actions could be accepted or justified.
17 NLRB v. Katz, 369 US 736, 50 LRRM 2177.

18 Exceptions to the general rule that an employer vi-
19 olates Section 8(a)(5) by making unilateral changes in
20 wages, hours, or other terms and conditions of employment
21 have been recognized by the National Labor Relations Board
22 and federal courts where an impasse in negotiations exists
23 and where the union waived its right to bargain on the
24 subject. Bi-Rite Foods, Inc., 147 NLRB 59, 56 LRRM 1150
25 (1964); Taft Broad-casting Co., 163 NLRB 475, 64 LRRM 1386,
26 65 LRRM 2272 (1968).

27 The facts set forth above relative to the setting of
28 Professor Spector's salary compel the conclusion that the
29 Employer committed an unfair labor practice. The parties
30 were engaged in negotiations over the MAF when the Employer
31 finally set Spector's salary at an amount which included the
32 MAF. There is no evidence to show that an impasse existed

1 at the time, nor is there evidence that the Union waived its
2 right to bargain on the subject. On the contrary, the
3 evidence shows that the parties eventually agreed upon a new
4 MAF.

5 I do not agree with the Employers' contention that this
6 matter is moot. Although the disagreement over the MAF and
7 Spector's salary was settled when the new contract was
8 executed, there still remains the question of whether the
9 Employers' unilateral conduct during negotiations with the
10 Union amounted to a violation of its obligation under
11 39-31-401(5), MCA. Surely the Union is entitled to have the
12 Board of Personnel Appeals decide whether, at the time it
13 happened, the Employers' action was an unfair labor practice.
14 Section 39-31-406(4), MCA, requires the Board to order a
15 party to cease and desist if it finds any person has engaged
16 in or is engaging in an unfair labor practice.

17 Although I agree with the Employer's claim that it was
18 in a damned if you do, damned if you don't situation, I
19 cannot agree that the situation was such that it posed a
20 threat to the very business of the college itself. No
21 disaster would have occurred had it lost Professor Spector's
22 services. On balance, the Employers' duty to bargain in
23 good faith with the Union outweighed its right to disregard
24 that obligation in order to retain one teacher.

25 The Employer urges that the Union did not charge in its
26 complaint a 39-31-401(5), MCA, violation regarding the
27 question of Spector's salary. In reading the first sentence
28 of the attachment to the complaint, I see that the contrary
29 is so.

30 CONCLUSION OF LAW

31 Defendants violated 39-31-401(5), MCA when they
32 unilaterally granted the MAF to Professor Spector.

